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No. 73-524

In the Supreme Court of the United States

OCTOBER TERM — 1973

YVONNE ALVAREZ SCHENNAULT, A/K/A YVONNE ALVAREZ, AS SECRETARY, CAPITAL ENTERPRIZE BUILDING CORP.; CAPITAL ENTERPRIZE BUILDING CORP., AND IRA BURMAN,

Petitioners,

VS.

UNITED STATES OF AMERICA AND KEVIN E. NESTOR, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

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YVONNE ALVAREZ SCHENNAULT, A/K/A YVONNE ALVAREZ, AS SECRETARY, CAPITAL ENTERPRIZE BUILDING CORP.; CAPITAL ENTERPRIZE BUILDING CORP., AND IRA BURMAN,

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UNITED STATES OF AMERICA AND KEVIN E. NESTOR, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on June 25, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit will not be published, 478 F. 2d 1406, but is printed in full as an Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*) was entered on June 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where an Internal Revenue Service summons is issued in cooperation with the Bureau of Narcotics and Dangerous Drugs, is the validity of such summons to be determined by applying the inter-agency influence test of *Abel* v. *United States*, 362 U.S. 217 (1960), or the tax purpose test of *Donaldson* v. *United States*, 400 U.S. 517 (1971)?

2. Regardless of the standard applied in determining the validity of the Internal Revenue summons, did the district court unduly restrict the scope of the summons enforcement hearing: (1) by refusing to require the disclosure of narcotics agents with whom the Internal Revenue special agent was cooperating in investigating Petitioner Schennault? (2) by quashing subpoenas which requested disclosure of procedural directives relating to inter-agency cooperation and dissemination of information between the Internal Revenue Service and the Bureau of Narcotics and Dangerous Drugs?

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. §7602

> "Examination of books and witnesses:
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any

transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other date which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

26 U.S.C. §7604

"Enforcement of summons:

(a) Jurisdiction of district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6424(d) (2), 6427(e) 2), or 7602 neglects or refuses to obey such

summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

STATEMENT

The principal petitioner in the district court was Kevin E. Nestor, a Special Agent of the Internal Revenue Service. On March 14, 1972 Special Agent Nestor served similar summonses on Yvonne Alvarez Schennault, Capital Enterprize Building Corporation and their attorney Ira Burman, all petitioners herein, seeking production of various books, records and documents. On March 27, 1972, pursuant to the directive of the summonses, petitioners appeared at the offices of the Internal Revenue Service but refused to testify or to produce any documents or records.

On May 4, 1972, Special Agent Nestor filed in the United States District Court for the Northern District of Illinois, Eastern Division, a petition to enforce the foregoing summonses. A hearing concerning the validity of the summonses was held on August 29 and 30, 1972 after which

the district court entered a judgment in favor of enforcement of the summonses requiring respondents to produce the demanded materials. This order was affirmed by the Seventh Circuit on appeal.

The summonses which are the subject matter of the instant proceeding were issued by Kevin E. Nestor, a Special Agent in special enforcement Group 203 of the Internal Revenue Service (App. 78)[1]. Because of its importance to the instant petition, a brief history of special enforcement Group 203 will hereafter be set forth.

Group 203 of the Internal Revenue Service was organized in August, 1971, for the express purpose of investigating people identified by the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs as alleged middle and upper echelon narcotic traffickers. (App. 78, 123). The subjects of investigation are obtained through the submission of names by local offices of the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs to a Treasury Selection Committee in Washington, D.C. (App. 128). This national committee, which includes representatives of each involved organization, chooses the particular subjects of investigation and furnishes these names to the representative local offices of Group 203. (App. 128). Agents of Group 203 are advised to conduct their investigation with a "spirit of cooperation" with agents of the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs. (App. 125). Such cooperation is accomplished informally among the agents themselves through the free interchange of agency files as well as an encouraged policy of meetings among

[1] Citation is to Appellant's Appendix on appeal to the Seventh Circuit.

such agents to exchange information. (App. 124-126). In addition, there exists a liaison group in Washington, D.C., specifically referred to as the Narcotics Project Manager, whose function is to disseminate among each participating agency any information supplied by the investigating agents. (App. 131). In this regard, therefore, Group 203 reports directly to Washington, D.C., as opposed to a normal tax investigation which proceeds through the internal local and regional offices of I.R.S. (App. 131).

It was through this procedure that Yvonne Schennault became an object of investigation by special enforcement Group 203. (App. 129, 103). Upon submission of her name a preliminary case control card was prepared (App. 166) which noted the intragovernmental referral and her alleged involvement in narcotics traffic. (App. 108-110). The Group 203 supervisor, Robert Fuesel, assigned Special Agent Nestor to investigate Yvonne Schennault.

Prior to the issuance of the subject summonses and within two weeks after his assignment of this case, Special Agent Nestor spoke to investigation agents of the Bureau of Narcotics and Dangerous Drugs concerning Yvonne Schennault and reviewed that agency's operating files. (App. 84, 85, 93). Such communications continued on a regular basis prior to the issuance of the summonses, Nestor admitting that he spoke to at least three agents of the Bureau of Narcotics and Dangerous Drugs concerning Yvonne Schennault (App. 85); that he had five to seven different conversations with these agents (App. 93); that he took notes of these conversations (App. 86); and that he disclosed information he had concerning Mrs. Schennault to these agents. (App. 95). Subsequently, Nestor advised the narcotics agents of the issuance of these summonses. (App. 97).

During the course and in aid of his specific investigation of Mrs. Schennault, Special Agent Nestor sought to obtain various records of respondent Capital Enterprize Building Corporation, which Nestor considered Mrs. Schennault's alter ego. (App. 103, 118-119). Upon failing to obtain these records, Nestor issued the subject summonses which called for Mrs. Schennault to testify and produce the following:

> "All books and records pertaining to the operations of Capital Enterprize Building Corporation for the periods beginning 7-1-66 and ending 6-30-71 including but not limited to the following specific records: 1) Bank statements, cancelled checks, deposit slips (tickets) and check stubs of all corporate bank accounts. 2) Monthly rental list (statement) reflecting names of tenants, apartment building addresses and monthly rental. 3) Monthly, quarterly, semi-annual and annual profit and loss statements for each building. 4) Payroll records. 5) Cash receipts and disbursement journals. 6) Corporate minute book. 7) Cash book maintained for rents paid in currency. 8) General ledger accounts including accounts of income and expense (i.e. operating ledger). And all notes and memoranda dealing with the operation of Capital Enterprize Building Corporation."

A similar summons was served on respondent Ira Burman, Mrs. Schennault's attorney. Respondents refused to testify or produce such records asserting the personal nature of the records, the Fifth Amendment's privilege against self-incrimination and the fact that the issuance of the summons was an abuse of process since it was issued for an illegal purpose, that is, as an aid to a criminal investigation for a non-tax related offense.

A summons enforcement proceeding was begun in the United States District Court for the Northern District of Illinois, Eastern Division. At the hearing on such en-

forcement the district judge concluded that he would follow his understanding of *Donaldson* v. *United States,* 400 U.S. 517 (1971), that as long as a purpose of the summons was a possible assertion of civil tax liability, that is sufficient to sustain enforcement of the summons despite any coincident relationship with the Bureau of Narcotics. (App. 87). The court refused to follow respondents' argument premised on *Abel* v. *United States,* 362 U.S. 217.

Prior to the enforcement hearing, respondents served subpoenas duces tecum on Special Agent Nestor, his group supervisor Robert Fuesel and the District Director of Internal Revenue seeking production at the hearing of any memoranda or instructions issued by the Attorney General, the Internal Revenue Service, the Bureau of Narcotics and Dangerous Drugs, the Federal Bureau of Investigation or the Bureau of Customs relating to the creation and operation of Group 203 and its specific procedures concerning inter-agency cooperation and the dissemination of information. The district court granted the Government's motion to quash these subpoenas (App. 69, 71).

In addition, the district court repeatedly refused to require the government to disclose the names of the agents of the Bureau of Narcotics who cooperated in Special Agent Nestor's investigation so the respondents might call them to testify concerning their conversations with Agent Nestor. (App. 44, 85, 118, 126). The government was also successful in refusing to produce Agent Nestor's notes of his conversations with these agents. (App. 87).

Each of the district court's rulings was affirmed by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

At the enforcement hearing in the district court, the respondents offered substantial evidence, through agents of the Internal Revenue Service, substantiating the fact that the instant "tax" investigation arose as a direct referral from the Bureau of Narcotics and Dangerous Drugs. (App. 103, 129). Additionally, it was established that the investigating Internal Revenue agents were advised to cooperate fully with agents of the Bureau of Narcotics in the exchange of information and, in fact, such cooperative effort had already been utilized in the instant joint investigation of Yvonne Schennault. (App. 93-95, 124-26). Despite acknowledging this cooperative relationship between the Internal Revenue Service and the Bureau of Narcotics and Dangerous Drugs, the district judge chose to enforce the summonses based on his understanding of *Donaldson* v. *United States,* 400 U.S. 517 (1971)—that as long as "*a* purpose of the summons was a possible assertion of civil tax liability, that is sufficient to sustain enforcement of a summons." (App. 87). Similarly, the Court of Appeals placed heavy reliance on the *Donaldson* opinion. (App. A. 7).[2]

The Supreme Court has heretofore determined that a criminal investigatory government agency cannot use the process of another administrative department in order to obtain evidence of criminal offenses. *Abel* v. *United States,* 362 U.S. 217 (1960). In *Abel,* a serious question was raised whether agents of the Federal Bureau of Investigation used the administrative process of the Immigration and Natural-

[2] Citation is to the opinion of the Seventh Circuit Court of Appeals attached hereto as App. A.

ization Service in order to obtain evidence of the defendant's participation in espionage activities. Though the Court ultimately determined that the facts did not warrant such a conclusion, it did emphasize that if true such activity must meet stern resistance by the courts:

> "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of getting evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States." 362 U.S. at 226, (Emphasis added.)

As an aid in determining whether an inter-agency abuse of process existed, the Supreme Court explicitly set forth the test to be applied:

> "The test is whether the decision to proceed administratively . . . was influenced by, and was carried out for a purpose of amassing evidence in the prosecution for crime." *Abel* v. *United States,* 362 U.S. at 230.

The basic principle espoused in *Abel* requires a court to determine whether an agency in issuing its process is acting in good faith or whether it is merely serving as a tool for another criminal investigatory agency. The test is clearly not one of exclusiveness, that is, one agency's administrative process need not be issued solely for the benefit of another agency's criminal investigation. The test, rather, is one of influence—was the issuance of one agency's process influenced by and carried out for another criminal investigatory agency's desire to amass evidence for crim-

inal prosecution. *Abel* v. *United States,* 362 U.S. 217, 230 (1960). This is the standard which must be applied to determine whether an abuse of administrative process exists. See *United States* v. *Baca,* 444 F. 2d 1292 (10th Cir. 1971); *cf., Anderson* v. *United States,* 318 U.S. 350; *United States* v. *Schafer,* 461 F. 2d 856 (9th Cir. 1972).

Donaldson, on the other hand, involved the issuance of an Internal Revenue summons solely for a tax purpose—whether it was criminal, civil or both. What is clearly evident from the Supreme Court's analysis in *Donaldson,* and what is critical to the instant petition, is that *Donaldson* involved the peculiar *intra-agency* Internal Revenue problem of civil tax and criminal tax investigation. It did not involve the use of *inter*-agency cooperation for criminal investigative purposes as did *Abel.* The distinction is clearly evident from the Supreme Court's careful analysis in *Donaldson* wherein it specifically and repeatedly referred to the distinctive attributes of the Internal Revenue Service's investigative procedures, including: (1) the separation of district offices into audit and criminal tax divisions; (2) the joint participation by revenue and special agents "in the conduct of *tax fraud* investigations"; (3) the internal review "programs for the investigation of alleged *tax frauds* and 'certain other civil and alleged criminal violations of *tax laws*"; (4) its emphasis on "the fact that a full-scale *tax fraud* investigation is being made does not necessarily mean that prosecution ensues when *tax liability* becomes apparent; (5) the specific references to statutory definitions of "*tax*" to include any additions or penalty; and (6) the Court's refusal to distinguish between a revenue agent and a special agent in "tax fraud" investigations. *Donaldson* v. *United States,* 400 U.S. at 534-36.

The entire *Donaldson* opinion is premised on the uniqueness of the Internal Revenue Service and its internal joint tax fraud investigations. Once this realm is over-stepped into the area of *inter*-agency "cooperation", then *Abel,* and not *Donaldson,* should control.

To grant certiorari in this case would afford the Supreme Court an opportunity to clarify the test district courts are to apply to determine if there may be an abuse of process in the enforcement of an Internal Revenue summons where *inter*-agency cooperation is apparent. This issue is of significant importance not only to petitioners but to the government as well since the government has apparently established extensive national, local and personal procedures for *inter*-agency cooperative investigations specifically relating to the Internal Revenue Service.[3]

II.

In challenging the validity of an Internal Revenue summons, the cases are legion that the respondent is entitled to a protracted adversary hearing for the purpose of showing that the summons was issued for an illegal purpose. *Reisman* v. *Caplan,* 375 U.S. 440 (1964); *Powell* v. *United States,* 379 U.S. 48 (1964). This concept of an adversary hearing prior to the enforcement of an Internal Revenue summons has recently been reaffirmed by the Supreme Court in *Donaldson* v. *United States,* 400 U.S. 517 (1971). The problem which continuously arises in summons enforcement cases, however, is what constitutes a sufficient adversary hearing. This issue, not reached in *Donaldson,* has not yet been decided by the Supreme Court.

The district court herein clearly restricted the scope of the required adversary hearing by excluding important relevant evidence which may well have had a significant

[3] See pp. 5-6 of this Petition.

bearing on the validity of the subject summonses even accepting the test proffered in *Donaldson* v. *United States.* The *Donaldson* standard to be applied by the district courts in determining the validity of a summons was explicitly set forth by the Court as follows:

> "We hold that under §7602 an Internal Revenue Summons may be issued in aid of an investigation if it is issued in good faith *and* prior to a recommendation for criminal prosecution." 400 U.S. at 526, (emphasis supplied).

Thus, the *Donaldson* standard is a dual one, and as such, two mutually exclusive determinations must be made by a court before it can reach a decision as to the validity of a summons. If, in fact, there has been no recommendation for criminal prosecution, the court must then proceed to consider whether the summons has been issued in bad faith. This precise analysis has been approved in *United States* v. *Kessler,* 338 F. Supp. 420 (S.D. Ohio 1972), wherein the court specifically interpreted the dual nature of the *Donaldson* test. See also *United States* v. *Billingsley,* 469 F. 2d 1208 (10th Cir. 1972).

Therefore, assuming *arguendo* that there has been no recommendation for criminal prosecution in the case at bar, there still remains the issue of "good faith", regardless of whether the standard to be applied is the one enunciated in *Donaldson* or the one enunciated in *Abel* v. *United States,* 362 U.S. 217 (1960). Furthermore, the issue of good faith is, by definition, one that is highly subjective, and as such, the trier of fact, in order to carry out the dictate in *Donaldson* or *Abel* is obligated to review any and all pertinent facts bearing on the issue prior to formulating a decision.

In addition, in order to fully comprehend the circumstances herein, this Court must keep in mind a distinctive feature of the summons enforcement proceeding. The nature of this proceeding is somewhat paradoxical in that while the respondents have the burden of proving an illegal purpose, *Donaldson* v. *United States,* 400 U.S. 517 (1971), the Government is the repository of all facts which bear on the respondents' burden. In order to meet their burden and make the hearing truly an adversary one, respondents, of necessity, are required to elicit certain facts from the Government which could weigh against the Government's asserted good faith.

During the course of the hearing below, the district court on successive occasions refused to require the Government to disclose the names of the agents of the Bureau of Narcotics and Dangerous Drugs who cooperated in Special Agent Nestor's investigation, as well as the notes of the five or seven conversations between Special Agent Nestor and these agents. In addition, the district court refused to enforce any of the three subpoenas issued to the District Director, Special Agent Nestor, and Special Agent Nestor's group supervisor, Robert Fuesel. Each of the subpoenas sought the same information—any memoranda or instructions issued by the cooperating agencies relating to the creation and operation of Group 203 and its specific procedures concerning inter-agency cooperation and the dissemination of information.[4]

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[4]"All memoranda, statements, orders or instructions issued by or to the Internal Revenue Service which reflect the directives, goals, policies, procedures, purposes and authorizations establishing or causing the establishment by the Internal Revenue Service of special enforcement groups, and in particular, Group 203, for the purpose of conducting Internal Revenue Service investigations of individuals suspected of or alleged to be part of the narcotics (Footnote continued)

It is clear that each of these inquiries was relevant to the issue of good faith as well as being solely within the knowledge of the Government. cf. *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963). Significant evidence was elicited from the two Internal Revenue agents who testified at the enforcement hearing establishing the encouraged "spirit of cooperation" between the investigating "tax" agent and agents of the Bureau of Narcotics and Dangerous Drugs. (App. 124-126; Br. at 11-12). The Internal Revenue agents were specifically advised to exchange information with the narcotics agents who were investigating the same person for narcotics offenses. (App. 124-126) This dissemination of information was to occur on a personal level as well as through the Narcotic Project Manager, a national office specifically organized to funnel information from the investigating Internal Revenue agents of Group 203 to the Bureau of Narcotics. (App. 126, 131). In quashing the foregoing subpoenaes, the district court foreclosed respondents from introducing the directives of the participating agencies concerning inter-agency cooperation, clearly relevant and important evidence bearing in the issue of the Government's good faith. Furthermore, it should be noted that respondents herein were not seeking to rummage in the Government files for specific evidence obtained against respondent Schennault. What respondents sought was merely the procedures and directives of cooperation and dissemination.

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traffic, including but not limited to, directives, agreements, policy statements, etc., of: (1) the Internal Revenue Service; (2) the Attorney General of the United States, and (3) those issued between the Internal Revenue Service and any other law enforcement agency of the United States including, in particular, the Bureau of Narcotics and Dangerous Drugs, the Federal Bureau of Investigation, and the Bureau of Customs, which relate to inter-agency cooperation, coordination and dissemination of information acquired as a result of such investigations."

Additionally, the refusal to require the Government to disclose the names of the "cooperating" agents of the Bureau of Narcotics unduly limited respondents from adducing relevant evidence on the issue of the Government's good faith. As hereinabove discussed, Special Agent Nestor testified to having at least five to seven different conversations with three narcotics agents to whom he admitted disclosing information he had obtained concerning Mrs. Schennault. (App. 84-85, 93-97). The respondents sought to call these agents as witnesses bearing on the good faith issue but were unable to do so because of the court's order. The relevancy of such evidence cannot be questioned since it may well have been that the testimony of the narcotics agents would have shed a different light upon Special Agent Nestor's testimony that there was *a* civil tax purpose to the investigation. Nevertheless, through its refusal to require disclosure, the district court recognized that the special agent's testimony concerning the purpose of the summons would be conclusive as to the "good faith" requirement of *Donaldson.*

An apparent conflict in the Circuit Courts of Appeal has arisen as to the scope and procedures to be followed in summons enforcement hearings. The Fifth Circuit in *United States* v. *Roundtree,* 420 F. 2d 845 (5th Cir. 1969), acknowledged application of the Federal Rules of Civil Procedure to these cases including full relevant discovery prior to the hearing. The First Circuit, on the other hand, in *United States* v. *Salter,* 432 F. 2d 697 (1st Cir. 1970), requires that the hearing be held initially at which time the respondent-taxpayer must establish some substantial evidence supporting his allegations of improper purpose before the district court may grant any discovery. Such a task is difficult, at best, since, as previously noted, the Gov-

ernment is the storehouse of the relevant facts which bear in the respondent's burden. On the instant appeal the Seventh Circuit has apparently adopted a third test, though it is somewhat akin to the *Salter* position. By restricting the scope of the hearing the district court relegated counsel to the testimony of the special agent that there was a tax purpose in the investigation and the issuance of the summons. The Seventh Circuit held that the district court did not abuse its discretion so holding (App. A. 9-10).

This case thus affords the Supreme Court an opportunity to define the discovery and scope of summons enforcement proceedings as an aid to the district courts which repeatedly are being presented with this issue.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 25, 1973

(Argued April 25, 1973)

Before

Honorable JOHN S. HASTINGS, *Senior Circuit Judge*

Honorable LEONARD P. MOORE, *Senior Circuit Judge**

Honorable THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA and SIMON LEVIN, Special Agent, Internal Revenue Service,

Petitioners-Appellees,

No. 72-1771 *vs.*

WILLIAM ZENOFF, as President of KREMBS FURNITURE COMPANY, INC., as Secretary Treasurer of KREMBS FINANCE CORPORATION, as President of ZENOFF INNS, INC., and as President of ZENOFF INVESTMENT CORPORATION; KREMBS FURNITURE COMPANY, INC.; KREMBS FINANCE CORPORATION; ZENOFF INNS, INC.; and ZENOFF INVESTMENT CORPORATION,

Respondents-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 72-C-225(W)

JAMES E. DOYLE, *Judge.*

---

* The Honorable Leonard P. Moore, Senior Circuit Judge for the Second Circuit, is sitting by designation.

UNITED STATES OF AMERICA and KEVIN E. NESTOR, Special Agent, Internal Revenue Service,
Petitioners-Appellees,

No. 72-1944 *vs.*

YVONNE ALVAREZ SCHENNAULT, A/K/A YVONNE ALVAREZ, as secretary CAPITAL ENTERPRIZE BUILDING CORP.; CAPITAL ENTERPRIZE BUILDING CORP.; and IRA BURMAN,
Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 C 1120
PHILIP W. TONE, *Judge.*

These two appeals are from orders of the respective district courts enforcing Internal Revenue Service (IRS) summonses directed to appellants. The summonses were issued pursuant to § 7602 of the Internal Revenue Code of 1954 and were ordered enforced under §§ 7402(b) and 7604(a) of the Code, essentially identical statutes which grant district courts jurisdiction "by appropriate process to compel *** attendance, testimony, or production" of records sought by means of an IRS summons. The appeals were separately briefed and argued, but they present common questions of law, and we have elected to dispose of them in a single order.

In No. 72-1771, appellant Zenoff, in his capacity as an officer of the four appellant corporations, was summoned to appear before appellee Levin, an IRS Special Agent, to testify concerning the tax liability of the corporations for three successive years and to produce for inspection certain records of the corporations. He appeared as ordered

at the time and place specified in the summonses, but he refused either to testify or to produce the summoned records. When the Government and Agent Levin petitioned the district court to enforce the summonses, Zenoff resisted enforcement on several grounds. (1) That Zenoff's ownership interests in the corporations were so extensive that the summoned records were in effect his personal records, so that their compelled production would violate his rights under the Fourth and Fifth Amendments. (2) That Agent Levin's sole purpose in issuing the summonses was to gather evidence for use against Zenoff in some future criminal prosecution for violation of the tax laws, and that this purpose was evidenced by certain statements made by Agent Levin and other IRS agents and by the fact that the statute of limitations on assessment and collection of tax had expired for two of the three years in issue. (3) That the IRS already had full access to the summoned records and had inspected them, so that enforcement of the summonses would run counter to the prohibition of § 7605(b) of the Code against unnecessary duplication in the inspection of records.

After full argument by the parties, the district court made oral findings of fact and conclusions of law on the basis of which it enforced the summonses as they related to production of the records. The district court specifically declined to rule on whether Zenoff must answer questions propounded by Agent Levin. The Government did not appeal the district court's failure to compel Zenoff to testify and indicated on oral argument in this court that it has no need of Zenoff's testimony at this time.

In No. 72-1944, appellant Schennault, in her capacity as secretary of appellant Capital Enterprize Building Corp., was summoned to appear before appellee Nestor, likewise

an IRS Special Agent, to testify concerning the corporation's tax liability for five successive years and to produce certain of its records for inspection. Appellant Burman, who is variously described as attorney for Schennault and for the corporation and to whom Schennault had given actual custody of the summoned records, received an identical summons. Schennault and Burman appeared before Agent Nestor at the time and place specified in the summonses, and they also refused either to testify or to produce the summoned records. They resisted the enforcement petition filed by the Government and Nestor on several grounds. (1) That the summoned records related to property owned by Schennault and/or her husband individually and, as such, were not subject to compelled production by Schennault in her capacity as corporate secretary. (2) That Agent Nestor's purpose in issuing the summonses had been to gather evidence for use against Schennault in some future criminal prosecution for violation of the narcotics laws. Further, that the summonses had been issued for the benefit of the Federal Bureau of Investigation and of the Bureau of Narcotics and Dangerous Drugs (BNDD) and that the non-tax-related purpose of the inquiry was evidenced by the fact that the statute of limitations on assessment and collection of tax had expired for several of the years in issue. (3) That the testimony sought would violate Schennault's rights under the Fifth Amendment and the attorney-client privilege.

Appellants moved for prehearing discovery and were allowed to depose Agent Nestor for the purpose of determining "whether the purpose of the I.R.S. in issuing summonses was to obtain evidence for the prosecution of [appellants] for non-tax-related offenses." Appellants' motion to compel Agent Nestor to answer certain interroga-

tories concerning his communications with agents of BNDD was denied, and their subpoenas duces tecum requiring Agent Nestor and two of his superiors to produce certain documents from Government files were quashed.

After an evidentiary hearing (which included a lengthy examination of Agent Nestor) and full argument by the parties, the district court enforced the summonses and entered appropriate findings of fact and conclusions of law. The judgment order required only the production of records. No specific mention was made of the requested testimony, but the Government on appeal has not objected to the omission.

The able district judges whose orders are appealed from were not clearly mistaken in holding that all the records sought are corporate records. Insofar as the records might tend to incriminate the corporate appellants, the corporations have no Fifth Amendment right to resist their production.[1]

Insofar as the records might tend to incriminate the individual appellants, the fact that the records are corporate prevents the individuals, regardless of the extent of their ownership interests in the corporations, from asserting

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[1] *Curcio* v. *United States*, 354 U.S. 118, 122 (1957); *Essgee Co.* v. *United States*, 262 U.S. 151, 155-156 (1923); *Wilson* v. *United States*, 221 U.S. 361, 382-384 (1911); *Hale* v. *Henkel*, 201 U.S. 43, 74-75 (1906); *United States* v. *Ellsworth*, 9 Cir., 460 F.2d 1246, 1248 (1972); *United States* v. *Bell*, 9 Cir., 448 F.2d 40, 41 n.1 (1971); *Benevolent & P.O. Elks, Lodge 615* v. *United States*, D. Minn., 352 F. Supp. 142, 145 (1972); *United States* v. *Lawhon*, S.D. Fla., 288 F. Supp. 669, 670 (1967).

whatever Fifth Amendment right they would otherwise have not to produce the records.[2]

It has long been established that an IRS summons does not violate the Fourth Amendment.[3]

The corporate form of the records disposes of the constitutional arguments, but it leaves for resolution the contentions based upon case law that the purpose of the IRS in undertaking the investigations in issue was improper and that its attempt to enlist judicial aid in furthering the investigations amounts to an abuse of the courts' process. The district courts here properly held that the decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971), controls.

Although *Donaldson* was concerned chiefly with the right of a taxpayer to intervene in an IRS investigation to prevent compliance by a third party with a summons issued for

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[2] *United States* v. *White*, 322 U.S. 694, 699 (1944); *Wilson* v. *United States*, 221 U.S. 361, 384-385 (1911); *United States* v. *Ellsworth*, 9 Cir., 460 F.2d 1246, 1248 (1972); *United States* v. *Bell*, 9 Cir., 448 F.2d 40, 41 (1971); *United States* v. *Held*, 6 Cir., 435 F.2d 1361, 1365-1366 (1970), cert. denied, 401 U.S. 1010 (1971); *United States* v. *Shlom*, 2 Cir., 420 F.2d 263, 265-266 (1969), cert. denied, 397 U.S. 1074 (1970); *United States* v. *Christiansen*, 3 Cir., 356 F.2d 986 (1966), cert. denied, 384 U.S. 962; *Wright* v. *Detwiler*, 3 Cir., 345 F.2d 1012 (1965); *Hair Industry, Ltd.* v. *United States*, 2 Cir., 340 F.2d 510, 511 (1965), cert. denied, 381 U.S. 950; *Wild* v. *Brewer*, 9 Cir., 329 F.2d 924, 925 (1964), cert. denied, 379 U.S. 914; *United States* v. *Theodore*, D.S.C., 347 F. Supp. 1070, 1072-1073 (1972); *United States* v. *Lawhon*, S.D. Fla., 288 F. Supp. 669, 670 (1967).

[3] *Donaldson* v. *United States*, 400 U.S. 517, 522 (1971); *First Nat'l Bank* v. *United States*, 267 U.S. 576 (1925), aff'g per curiam S.D. Ala., 295 F. 142 (1924); *United States* v. *Shlom*, 2 Cir., 420 F.2d 263, 266 (1969), cert. denied, 397 U.S. 1074 (1970).

the third party's records concerning the taxpayer, the dicta in Part VII of the opinion [*id.* at 531-536] were clearly intended to guide the lower courts in dealing with "abuse of process" objections to summons enforcement. The Court said an IRS summons may be issued (and, by implication, therefore, enforced) "in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." *Id.* at 536. Without deciding precisely when a recommendation for criminal prosecution can be said to have been made,[4] we think that the holdings in the instant cases that no such recommendations had been made were not clearly erroneous.

As far as the requirement of good faith is concerned, we read *Donaldson* (as the district courts here did and as the other courts which have considered the question have)[5] to say that so long as the determination of civil tax liability is *one* of the purposes for issuance of a summons, the test of good faith has been met. The findings in the instant cases

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[4] The Tenth Circuit has recently held that "a recommendation for criminal prosecution" within the meaning of *Donaldson* occurs when a case is referred by the IRS to the Department of Justice. *United States* v. *Billingsley*, 469 F.2d 1208, 1210 (1972), rev'g N.D. Okla., 331 F. Supp. 1091 (1971).

[5] *See, e.g., United States* v. *Cleveland Trust Co.*, 6 Cir., 474 F.2d 1234, 1236 (1973); *United States* v. *Wall Corp.*, D.C. Cir., 475 F.2d 893, 894-895 (1972); *United States* v. *Richardson*, 10 Cir., 469 F.2d 349, 352 (1972); *United States* v. *National State Bank*, 7 Cir., 454 F.2d 1249, 1251-1252 (1972); *United States* v. *Couch*, 4 Cir., 449 F.2d 141, 143 (1971), aff'd, 409 U.S. 322 (1973); *United States* v. *Troupe*, 8 Cir., 438 F.2d 117, 119 (1971). *See also United States* v. *Moriarty*, 7 Cir., 435 F.2d 347, 349 (1970), a pre-*Donaldson* case applying the same test.

that such determination was one of the purposes for issuance of the summonses were not clearly erroneous. "The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined." *United States* v. *Powell,* 379 U.S. 48, 58 (1964).

Statements by an IRS agent that the purpose of the investigation is the discovery of evidence of tax fraud for possible criminal prosecution are not inconsistent with a finding that the investigation also has a valid goal of determining civil tax liability, for evidence of tax fraud does not lead inevitably to prosecution.[6]

Schennault and Burman argue that *Donaldson* does not control their case because the involvement of other agencies of the Government in their investigation calls instead for the application of certain language in *Abel* v. *United States,* 362 U.S. 217 (1960).[7] The citation in inapposite. The administrative arrest warrant in *Abel* did not require judicial enforcement, as does an IRS summons. The evidence of collusion between two agences for improper purposes in

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[6]As the Supreme Court noted in *Donaldson,* 400 U.S. at 535 n.17, only half of the full-scale tax fraud investigations undertaken in 1969 led to recommendations for prosecution. The investigations which did not lead to such recommendations resulted in deficiencies and penalties of $20 million earmarked for civil collection.

[7]"The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." 362 U.S. at 226.

Abel was much stronger than any evidence on the record in this case. Nevertheless, the Supreme Court affirmed Abel's conviction.

In this case, the strongest inference that can be drawn from the record in appellants' favor is that BNDD caused IRS to begin the investigation of Schennault. There is not the slightest evidence that BNDD had anything to do with the issuance of the summonses for the production of corporate records. The district court specifically found probable cause to suspect that the corporation incorrectly avoided the payment of taxes either in claiming a net operating loss carryover in 1968 or in failing to file a return in a previous year. This finding is more than sufficient to rebut any inference of bad faith in the issuance of the summonses.

Appellants' final objections, which Schennault and Burman raise with particularity and Zenoff adverts to, are to the truncated nature of the evidentiary hearings and pretrial discovery. Zenoff did not seek pretrial discovery, nor did he object to the manner in which the district court conducted the hearing. It is clear that the district court's ruling was akin to a grant of summary judgment upon its finding that "there is no evidence or allegation with respect to those factors that might bear on the presence or absence of good faith." In accepting as true the allegations in Zenoff's answer to the petition for enforcement, the district court was not required to accept his conclusory statement that Agent Levin's "sole purpose in joining the investigation and in participating in it [was] to seek to obtain evidence leading to a possible prosecution of a criminal charge." This is true because the particular facts pleaded did not support the conclusion and because the

statement, in its reference to the purpose of the agent in joining the overall investigation, did not relate directly to the purpose for the issuance of the summonses in question.

The limitation of Schennault and Burman's pretrial discovery was well within the district court's discretion under applicable case law.[8] We find no abuse in its exercise.

Since neither district court specifically ruled on the propriety of compelling the individual appellants to testify in response to the summonses, we merely note that the cases[9] hold that objection must be made to particular questions at the time when they are asked and that the possibility that objectionable questions will be asked does not excuse failure to appear in response to a summons for the purpose of giving testimony.

For the foregoing reasons, it is ordered and decreed that the orders appealed from be and they are hereby affirmed.

AFFIRMED.

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[8] *Donaldson* v. *United States*, 400 U.S. 517, 528-529 (1971); *United States* v. *Turner*, 7 Cir., No. 73-1193, slip opinion at 4-6 (June 12, 1973); *United States* v. *Wall Corp.*, D.C. Cir., 475 F.2d 893, 895 (1972); *United States* v. *National State Bank*, 7 Cir., 454 F.2d 1249, 1252 (1972); *United States* v. *Bell*, 9 Cir., 448 F.2d 40, 42 (1971).

[9] *United States* v. *Ellsworth*, 9 Cir., 460 F.2d 1246, 1248 (1972); *United States* v. *Bell*, 9 Cir., 448 F.2d 40, 42 (1971); *United States* v. *Roundtree*, 5 Cir., 420 F.2d 845, 852 (1969); and cases cited in *id.* at 852 n.18; *In re Partridge*, S.D.N.Y., 59-1 U.S. Tax Cas. ¶ 9291 (1959). The same procedure is the proper one for raising the claimed attorney-client privilege. *Colton* v. *United States*, 2 Cir., 306 F.2d 633, 639 (1962), cert. denied, 371 U.S. 951 (1963).

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In the Supreme Court of the United States

OCTOBER TERM, 1973

YVONNE ALVAREZ SCHENNAULT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND KEVIN E. NESTOR, SPECIAL AGENT, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Following petitioners' refusal to comply with Internal Revenue Service summonses requiring production of books and records of petitioner Capital Enterprize Building Corporation, Special Agent Nestor and the United States initiated this proceeding to enforce the summonses under Section 7604, Internal Revenue Code of 1954 (Pet. 4-5). The district court denied all petitioners' motions for discovery and production of Internal Revenue Service files but did allow them to take the deposition of Special Agent Nestor. However, the court denied petitioners' motions to compel Nestor to answer certain interrogatories concerning conversations he had with agents of the Bureau of Narcotics and Dangerous Drugs (Pet. App. 4-5). The district court ordered petitioners to produce the summoned books and records, and the Seventh Circuit affirmed (Pet. App. 2-10).

2. Both courts below correctly applied the standards for enforcement of an Internal Revenue Service summons announced in *Donaldson* v. *United States*, 400 U.S. 517. There, this Court unanimously held that "under §7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution" (400 U.S. at 536). In order to quash the summons, the summoned party must show an abuse of process, such as an improper purpose reflecting on the good faith of the investigation. *United States* v. *Powell*, 379 U.S. 48, 58.

Petitioners have not shown either that the summons was issued after a recommendation for criminal prosecution or that the agent acted other than in good faith in issuing the summons. To the contrary, the government established through the testimony of the agent (R. 73-74, 104)[1] that the purpose of the summons was to investigate the income tax returns of petitioner Capital Enterprize Building Corporation. As the court of appeals stated (Pet. App. 7), the lower courts have unanimously held that "so long as the determination of civil tax liability is *one* of the purposes for issuance of a summons, the [*Donaldson*] test of good faith has been met [emphasis in original]." See, *e.g.*, *United States* v. *Cleveland Trust Co.*, 474 F. 2d 1234, 1236 (C.A. 6), certiorari denied *sub nom. Miceli* v. *United States*, No. 72-1606, October 9, 1973; *United States* v. *Wall Corp.*, 475 F. 2d 893, 894-895 (C.A. D.C.); *United States* v. *Richardson*, 469 F. 2d 349, 352 (C.A. 10); *United States* v. *National State Bank*, 454 F. 2d 1249, 1251-1252 (C.A. 7); *United States* v. *Couch*, 449 F. 2d 141, 143 (C.A. 4), affirmed, 409 U.S. 322; *United States* v. *Troupe*, 438 F. 2d 117, 119 (C.A. 8).

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[1] "R." references are to the appendix in the court of appeals.

3. Petitioners do not challenge the finding of good faith made by the courts below. However, they contend (Pet. 11-12) that the *Donaldson* test of summons enforceability is inapplicable because agents of the Bureau of Narcotics and Dangerous Drugs gave to the Internal Revenue Service the information leading to the tax investigation. But there is no bar in *Donaldson* or elsewhere which would preclude the Internal Revenue Service from acting upon an investigatory lead from another government agency or from any other source. *E.g., United States* v. *Cleveland Trust Co., supra; United States* v. *DeLuca,* 30 A.F.T.R. 2d 5771 (E.D. N.Y.), affirmed, 31 A.F.T.R. 2d 1310 (C.A. 2); *United States* v. *Troupe, supra; United States* v. *Stamp,* 458 F. 2d 759 (C.A. D.C.), certiorari denied, 409 U.S. 842. See also *United States* v. *Fruchtman,* 421 F. 2d 1019 (C.A. 6).[2]

Abel v. *United States,* 362 U.S. 217, relied upon by petitioners (Pet. 10), has no bearing on the issue here. That case concerned the propriety of using, in a subsequent unrelated criminal prose-

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[2]Contrary to petitioners' assertion (Pet. 11), *Donaldson* cannot be limited to the case where the only possible criminal conduct is tax evasion. This Court's opinion (400 U.S. at 532, n. 13) cites with approval *Venn* v. *United States,* 400 F. 2d 207 (C.A. 5). There, an Internal Revenue Service summons was enforced notwithstanding the existence of a criminal antitrust prosecution against the summoned third party, in which discovery of much the same material was sought with limited success. Because of the existence of the criminal prosecution, the government assured the Fifth Circuit that the material would be used only for the purpose of investigating the liability of the taxpayer and not in the antitrust case. See also *United States* v. *Stamp,* 458 F. 2d 759, 776 (C.A. D.C.), certiorari denied, 409 U.S. 842; *DiPiazza* v. *United States,* 415 F. 2d 99, 106-107 (C.A. 6).

cution, evidence which had been obtained pursuant to an administrative warrant. The Court concluded that the evidence was admissible in the criminal prosecution because the administrative warrant was issued in a bona fide manner and was not used as an instrument of criminal law enforcement. Under this standard, it would appear that any evidence obtained by use of the Internal Revenue Service summons would be admissible in a subsequent criminal proceeding. However, if and when there is any prosecution of petitioners under the narcotics laws, the question whether *Abel* would prohibit the use of any information obtained by the present investigation may be considered. See, *e.g., United States* v. *Blue,* 384 U.S. 251, 255.

4. Contrary to petitioners' argument (Pet. 12), they were not entitled to "a protracted adversary hearing" in order to show the lack of good faith in the issuance of the summons. This Court in *Donaldson* (400 U.S. at 528-529) expressly recognized that Rule 81(a)(3) of the Federal Rules of Civil Procedure empowers a district court to suspend or limit discovery in a summons enforcement proceeding. As the court of appeals observed (Pet. App. 10), this limitation was "well within the district court's discretion under applicable case law." *United States* v. *Turner,* 480 F. 2d 272 (C.A. 7); *United States* v. *Wall Corp., supra, States* v. *Wall Corp., supra,* at 895; *United* at 895; *United States* v. *National State Bank, supra,* at 1252 and *United States* v. *Bell,* 448 F. 2d 40, 42 (C. A. 9).

Finally, there is no conflict, as alleged by petitioners (Pet. 16), between the decision below and *United States* v. *Roundtree,* 420 F. 2d 845 (C.A. 5), or with *United States* v. *Salter,* 432 F. 2d 697 (C.A. 1), with respect to the availability of pretrial discovery in summons enforcement proceedings. All *Roundtree* held was that the taxpayer should have been permitted to depose the revenue agent, a privilege which petitioners were accorded in this case. In this respect, the *Salter* holding is identical. See 432 F. 2d at 701, n. 7. However, to the extent that *Roundtree* enunciates a less stringent standard than *Salter* and the decision below as to under what circumstances discovery is available, those observations were made prior to this Court's *Donaldson* decision and were modified by the Fifth Circuit after *Donaldson* in *United States* v. *Newman,* 441 F. 2d 165, 169-170. The Fifth and First Circuits, as well as the decision below, presently permit a district court to grant the use of discovery in a summons enforcement proceeding only where the taxpayer raises in "a substantial way" evidence which supports his allegations of "substantial deficiencies" in the issuance of the summons.

For the reasons stated, it is repectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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